DRAFT

IN THE COURT OF APPEAL

CRIMINAL DIVISION

No. 2019 00805 B3

Neutral Citation Number: **[2019] EWCA Crim 2162**

Royal Courts of Justice

Friday, 04 October 2019

Before:

LORD JUSTICE HADDON-CAVE
MRS JUSTICE COCKERILL DBE
HIS HONOUR JUDGE BATE

R E G I N A

V

ABDU SHAHER

REPORTING RESTRICTIONS APPLY:
SEXUAL OFFENCES (AMENDMENT) ACT 1992

Transcript prepared from digital audio by
Opus 2 International Ltd.
Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
CACD.ACO@opus2.digital

MR N. J. LUMLEY QC appeared on behalf of the Applicant.
THE CROWN did not appear and was not represented.

J U D G M E N T

MRS JUSTICE COCKERILL DBE:

1 The Applicant was convicted unanimously on 1 February 2019 in the Crown Court sitting at Leeds on retrial, on two counts of rape and two counts of sexual assault by penetration. The Applicant was sentenced on 1 March 2019 for a total of four years and six months' imprisonment, to take effect from 7 November 2017.

2 The Applicant's victim is entitled to the protection of the Sexual Offences (Amendment) Act 1992. Under the provisions of that Act, where a sexual offence has been committed against a person, no matter relating to that person shall, during their lifetime, be included in any publication if it is likely to lead members of the public to identify them as the victim of that offence. This prohibition will continue to apply unless and until it is either waived or lifted in accordance with the Act. We shall not, therefore, name the victim but shall instead refer to her by initials.

3 The Applicant, this morning, seeks to renew his application for leave to appeal against conviction, leave having been refused on the papers by Sir John Royce. He has been very ably represented by trial counsel, Mr Lumley QC, who has put forward submissions with great clarity and we have found them of much assistance.

4 The point at issue is a short one: was the Judge correct to reject a submission of no case to answer? The facts of the offences have already been set out in the judgment of this Court in *R v Shaher* [2018] EWCA Crim 2316 and are also set out fully in the Criminal Appeal Office summary. It is therefore not necessary to rehearse them here.

5 The question for the Court is simply whether the Judge erred in refusing the submission of no case against the background of those facts. Mr Lumley, appearing before us this morning,

made a number of points, pointing out that the essence of the case was that there was insufficient evidence on which a jury, properly directed, could safely conclude that the Applicant either did not believe DG had consented or that such a belief as he had was reasonable.

6 Mr Lumley highlighted a number of features of the evidence - in particular, the fact that the victim was not forced to lie with the Applicant; that there was no suggestion of a raised voice or threatening behaviour or any form of force. He reminded us that DG removed part of her own clothing, and suggested that what was seen on the evidence was rather to be seen as a dynamic incident of lovemaking. It was not a question of rape, there was no question of the victim being physically frozen – she had taken part physically to an extent in what took place.

7 He highlighted carefully the evidence, which was given very candidly by the victim, where she accepted that a third party watching would have thought that she was consenting, and a passage in her evidence where she said:

> "… I guess it would look normal to someone looking in. I didn't feel I was moving… someone would have seen me moving… I didn't push him away… I didn't do anything to give him the idea that I was not happy. It did not appear to him that I was not consenting. I didn't give any sign that I didn't want it. I completely froze."

8 Mr Lumley submits that leaving the case to the jury, in that context, against the background of that evidence, meant that it was left to them to put far too much weight on extraneous factors, such as the power imbalance and the age imbalance between the Applicant, who was in his late 50s at the time of the incident, and the victim, who was 18. He also drew our

attention to the fact that the Applicant and the victim had had conversations after the event and pointed out that that was a matter which might have been thought to be relevant.

9 Against that background, we turn to the question of whether the Recorder erred. We do not consider that she did so for the reasons given by Sir John Royce, with which we entirely agree. His reasons were as follows:

> "The Recorder carefully analysed the evidence. At page 4 of the ruling she properly set out the areas of dispute .... Her reasons for concluding that there was sufficient evidence to be left to the jury she set out at page 5. She was entitled, for those reasons, to reject the submission."

10 We would add that, in our view, the ruling on the submission was clear, careful and not by any means open to criticism. The Recorder plainly applied the correct test, and the contrary is not seriously suggested. Nor can we accept the submission that there was no evidence on the basis of which the jury could have been sure that, if the Applicant considered that she was consenting, that belief was unreasonable.

11 On the basis of the uncontroversial facts as to the background - the respective ages and roles of the individuals, taken together with DG's evidence – it was, in our judgment, plainly open to the jury to form the view that they were sure the Applicant's belief was unreasonable. Such evidence included the fact that, if DG's evidence were accepted by the jury, she did not kiss the Applicant back, she did not respond to his enquiries, she had to be directed to perform oral sex on him and was "frozen", rather than responsive, when they had intercourse – though she moved to some extent.

12 The fact that her subjective interpretation of what another party might take from what she in fact did-- what one might term the *"could not possibly have known*" point -- was that the Applicant could not have known she was not consenting, does not mean that there was objectively no such evidence. The fact that another jury would not have convicted or, on

another view of the evidence - and giving slightly more weight to the various pieces of evidence on which Mr Lumley has placed weight, including for example the later conversations to which he referred – could not convict, does not detract from the fact that there was such evidence on the basis of which a jury, (not every jury, but a jury) could well form a view that they were sure there was no reasonable belief in consent.

13 On that basis, in our judgment, the application for leave to appeal conviction must be refused. We would, however, like to add that, in the course of considering the papers, we have had have the opportunity to read the Recorder's summing-up and, although it is not directly relevant to the point which is before us this morning, we would like to pay tribute to it, as an absolute model of clarity.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

Transcribed by ***Opus 2 International Limited***
Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
admin@opus2.digital

** This transcript has been approved by the Judge (subject to Judge's approval) **